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BRIEFS

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No. 16-299

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,

Petitioner,

v.

U.S. DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE ARMY CORPS OF ENGINEERS, AND
U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS AMERICAN FARM BUREAU FEDERATION *ET AL.* IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Whether the Sixth Circuit erred when it held that it has jurisdiction under 33 U.S.C. § 1369(b)(1)(F) to decide petitions to review the waters of the United States rule, even though the rule does not "issu[e] or den[y] any permit" but instead defines the waters that fall within Clean Water Act jurisdiction.

RULE 29.6 STATEMENT

The respondents filing this brief are:

American Farm Bureau Federation; American Petroleum Institute; American Road and Transportation Builders Association; Greater Houston Builders Association; Leading Builders of America; Matagorda County Farm Bureau; National Alliance of Forest Owners; National Association of Home Builders; National Association of Realtors; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Pork Producers Council; National Stone, Sand and Gravel Association; Public Lands Council; Texas Farm Bureau; and U.S. Poultry & Egg Association (petitioners below in No. 15-3850).

Utility Water Act Group (petitioner below in No. 15-3858).

Florida Stormwater Association; and Southeast Stormwater Association (petitioners below in No. 15-4159).

CORPORATE DISCLOSURE STATEMENT

Respondents are not-for-profit advocacy groups. They have no parent corporations and do not issue publicly traded stock.

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BRIEF OF RESPONDENTS IN SUPPORT OF THE PETITION

Respondents represent a broad swathe of the national economy. Their members employ tens of millions of people, own or operate tens of millions of acres of land affected by the Waters of the United States ("WOTUS") Rule, and, using that land, provide food, fuel, housing, infrastructure, minerals, energy, and forest products for the entire U.S. population, and manage stormwater in the Southeastern States.[1]

These groups are respondents rather than petitioners here solely because uncertainty over which court has jurisdiction over their challenges to the WOTUS Rule forced them to file protective petitions for review in the court of appeals, in addition to the (still pending) complaints that many of them filed in district courts. Respondents fully agree with petitioner National Association of Manufacturers ("NAM") that this Court should grant certiorari to reverse the Sixth Circuit's jurisdictional decision and end once and for all the uncertainty that forced these multiple filings and produced the unhelpful and fractured three-opinion decision below.

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[1] Respondents here are the American Farm Bureau Federation; American Petroleum Institute; American Road and Transportation Builders Association; Greater Houston Builders Association; Leading Builders of America; Matagorda County Farm Bureau; National Alliance of Forest Owners; National Association of Home Builders; National Association of Realtors; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Pork Producers Council; National Stone, Sand and Gravel Association; Public Lands Council; Texas Farm Bureau; U.S. Poultry & Egg Association; Utility Water Act Group; Florida Stormwater Association; and Southeast Stormwater Association.

Respondents adopt in full petitioner NAM's arguments and do not repeat them here. Instead, respondents show why, from their perspective, this Court's immediate review is necessary.

STATEMENT

The petition presents a recurring question of significant importance concerning the proper forum for judicial review of Clean Water Act ("CWA" or "Act") regulations. As the petition explains, the Sixth Circuit erred in exercising jurisdiction under 33 U.S.C. § 1369(b) over challenges to the regulation that redefines the statutory phrase "waters of the United States." That error deepens a conflict among the circuits that perpetuates uncertainty and will continue to waste court and party resources. Petitioner also is correct that additional litigation in the lower courts will not refine the question presented by the petition.

Respondents are frequent litigants in CWA cases. Because the Act can impose substantial civil and criminal liability on industry, it is essential to respondents and their members that CWA regulations in fact comply with the CWA, the Administrative Procedure Act ("APA"), and other governing laws. Respondents have defended CWA regulations that have satisfied these standards and have challenged CWA regulations that have failed them.

The underlying regulation at issue here—the WOTUS Rule—is one of the most consequential CWA regulations ever promulgated. In the words of the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers (together, "the agencies"), it is "a national rule of unique importance, promulgated after a massive rulemaking process." Gov't Br. 63, *Chamber of Commerce* v. *EPA*, No. 16-5038 (10th Cir. Aug. 19, 2016). If affirmed by the courts and enforced

by the agencies, the WOTUS Rule would vastly expand the reach of the CWA in a manner that Congress never intended and that this Court's decisions prohibit. Respondents therefore were intent on challenging the Rule as soon as it was published in June of 2015.

Before respondents could file suit, however, they faced a threshold jurisdictional quandary that they have encountered before and will face again if this Court does not take this opportunity, *now*, to resolve the issue. Challenges to agency actions generally must be brought in the district courts under the APA. 5 U.S.C. § 703. The CWA, however, vests exclusive jurisdiction in the courts of appeals to review seven enumerated actions of the EPA Administrator, including actions "(E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, [and] (F) in issuing or denying any permit under section 1342 of this title." 33 U.S.C. § 1369(b)(1)(E)-(F). For reasons explained in the petition and below, respondents do not believe that the WOTUS Rule falls within Section 1369(b); they believe that jurisdiction over challenges to the WOTUS Rule instead lies in the district courts under the APA.

Many respondents here filed APA actions in the Southern District of Texas and Northern District of Florida challenging the WOTUS Rule, which remain pending. *Am. Farm Bureau Fed'n* v. *EPA*, No. 3:15-cv-165 (S.D. Tex.); *Southeast Stormwater Ass'n* v. *EPA*, No. 4:15-cv-579 (N.D. Fla.). Scores of other litigants—including state, municipal, industry, and environmental plaintiffs—shared respondents' jurisdictional beliefs and filed more than a dozen other district court actions under the APA. See Pet. 8 n.1 (listing cases).

In light of the circuit conflict on the issue, and ambiguous language in the preamble to the WOTUS Rule, respondents and other plaintiffs feared that some courts might find that exclusive jurisdiction lay in the courts of appeals under Section 1369(b). As the agencies admitted when issuing the WOTUS Rule, "courts have reached different conclusions on the types of actions that fall within section [1369]." 80 Fed. Reg. 37054, 37104 (June 29, 2015). Importantly, if courts were to rule that exclusive jurisdiction lay in the courts of appeals under Section 1369(b), then petitions for review had to be filed in the courts of appeals within 120 days of the issuance of the final rule. See 33 U.S.C. § 1369(b)(1).

By late July 2015, at least twelve petitions for review had been filed in multiple courts of appeals. The Judicial Panel of Multidistrict Litigation ("JPML") randomly consolidated those petitions before the Sixth Circuit. See 28 U.S.C. § 2112(a)(3); Consolidation Order, MCP No. 135 (J.P.M.L. July 28, 2015). Thereafter, additional petitions for review were filed in the Sixth Circuit. Respondents here all filed protective petitions for review. Pets. for Review, No. 15-60509 (5th Cir. July 24, 2015) (UWAG); No. 15-3850 (6th Cir. Aug. 6, 2015) (AFBF *et al.*); No. 15-4159 (6th Cir. Oct. 26, 2015) (Southeast Stormwater Ass'n *et al.*).

The JPML's consolidation order aggravated respondents' jurisdictional concerns because the Sixth Circuit had previously given expansive scope to Section 1369(b) in *National Cotton Council* v. *EPA*, 553 F.3d 927 (6th Cir. 2009), the decision that the Eleventh Circuit criticized and rejected in *Friends of the Everglades* v. *EPA*, 699 F.3d 1280 (11th Cir. 2012). See Pet. 20-22.

The petitions to the appellate courts explained that respondents "believe that jurisdiction to review the [WOTUS] Rule lies properly and exclusively in the district courts" and that respondents filed the petitions "solely to preserve their rights." AFBF *et al.* Pet. for Review at 1-2; see also UWAG Pet. for Review at 3-4.

Petitioner NAM intervened as a respondent in the Sixth Circuit. Motion to Intervene, No. 15-3850 (6th Cir. Aug. 11, 2015). The American Farm Bureau Federation respondents, joined by petitioner, then jointly moved to dismiss the petitions for review for lack of jurisdiction. See Joint Motion to Dismiss, No. 15-3751 (6th Cir. Oct. 2, 2015). Many other petitioners in the Sixth Circuit likewise moved to dismiss their own and other petitions for lack of jurisdiction. See, *e.g.*, Intervenor UWAG Motion to Dismiss, No. 15-3751 (6th Cir. Oct. 2, 2015).

Respondents have spent the last year embroiled in litigation over this jurisdictional issue. Respondents have filed motions to dismiss, reply briefs, and a petition for rehearing in the Sixth Circuit. Some have filed amicus briefs in other courts of appeals seeking to overturn dismissals of district court complaints—including dismissals that relied on the Sixth Circuit's erroneous decision here. See Br. Amicus Curiae of Am. Farm Bureau Fed'n *et al.*, *Georgia* v. *McCarthy*, No. 15-14035 (11th Cir. Sept. 22, 2015); Br. Amicus Curiae of Am. Farm Bureau Fed'n *et al.*, *Chamber of Commerce* v. *EPA*, No. 16-5038 (10th Cir. July 8, 2016). Some respondents also have opposed agency motions to dismiss, for lack of jurisdiction, their APA lawsuits in the district courts. See Opp. to Motion to Dismiss, *Am. Farm Bureau Fed'n* v. *EPA*, No. 3:15-cv-165 (S.D. Tex. May 13, 2016); Order, *id.* (S.D. Tex. May 18, 2016) (taking motion under advisement).

Well more than a year has passed since respondents here filed district court actions and/or petitions for review. Yet neither we nor any other party has yet filed any brief in any court presenting the merits of the challenges to the WOTUS Rule.[2]

REASONS FOR GRANTING THE PETITION

I. The Petition Presents A Recurring Question That Causes Undue Delay And Wastes Judicial And Party Resources.

1. The courts of appeals are in disarray in their interpretations of Section 1369(b). There is an acknowledged conflict between the Sixth and Eleventh Circuits. See *Friends of the Everglades*, 699 F.3d at 1287-1288 (rejecting the Sixth Circuit's analysis in *National Cotton* and holding that the Eleventh Circuit lacked original jurisdiction to review EPA's water transfers rule); see also Allison LaPlante *et al.*, *On Judicial Review under the Clean Water Act in the Wake of* Decker v. Northwest Environmental Defense Center: *What We Know Now and What We Have Yet to Find Out*, 43 Envtl. L. 767, 767 (2013) ("Circuits are split on the scope of the CWA's direct judicial review provision").

The law is also muddled within circuits. For example, "the Ninth Circuit is split both with other circuits, and within itself, on the issue of whether the courts of appeals have jurisdiction to review underlying

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[2] The Sixth Circuit suspended the schedule for merits briefing described in the petition until the court resolved pending motions to complete the administrative record. The Sixth Circuit has now issued a new briefing schedule under which opening briefs will be filed on November 1, 2016, and briefing will be complete on March 8, 2017. Case Mgt. Order No. 4 (6th Cir. Oct. 6, 2016).

NPDES regulations pursuant to section 509(b)(1)(F)." LaPlante *et al.*, *supra*, 43 Envtl. L. at 816.

The Sixth Circuit panel's 1-1-1 decision evidences the confusion. While recognizing that the WOTUS Rule does not fall within the text of Section 1369(b)(1)(F), Judge McKeague claimed that the Sixth Circuit nevertheless could exercise jurisdiction under case law including *National Cotton*, which he viewed as correctly decided. Pet. App. 17a-24a. Judge Griffin would have held that the court lacks jurisdiction under Section 1369(b)(1)(F), but he ruled that he was compelled to exercise jurisdiction under *National Cotton*, which he explained was incorrectly decided. *Id.* at 38a-45a. Judge Keith agreed with Judge Griffin that the Sixth Circuit lacked jurisdiction, but he would have found *National Cotton* distinguishable. *Id.* at 45a-47a.

Each judge's reading of the same statute and case law thus differed from the next. That result provides no guidance for future cases. And it provides no comfort in this case, because it raises the distinct possibility that, if the case now proceeds to a merits decision in the Sixth Circuit, millions of dollars and months of time could be expended by the parties and the court to no effect if the jurisdictional ruling is subsequently reversed en banc or by this Court.

Given the lack of clarity across and within circuits on the threshold issue of jurisdiction, the Seventh Circuit has identified the only sound strategy for litigants seeking to challenge a CWA regulation: "careful counsel must respond * * * by filing buckshot petitions" in both the district courts and courts of appeals. *Roll Coater, Inc.* v. *Reilly*, 932 F.2d 668, 671 (7th Cir. 1991). The federal agencies have agreed, recently telling the Tenth Circuit that "[g]iven uncertain jurisdiction [over challenges to the WOTUS

Rule], it made sense for Plaintiffs to file in two courts to preserve a forum for their claims." Gov't Br. 24, *Chamber of Commerce* v. *EPA*, No. 16-5038 (10th Cir. Aug. 19, 2016). That perverse state of affairs is now the norm in CWA litigation. Challengers routinely file two actions—one in the district court under the APA, one in the court of appeals under Section 1369(b)—to obtain judicial review of a single CWA regulation. See Pet. 25 n.7 (citing cases). And before either court can address the merits, both must decide which has jurisdiction to proceed.

The end result often turns on which circuit wins the JPML consolidation lottery. In the case challenging EPA's water transfers rule, the JPML consolidated the petitions before the Eleventh Circuit, which dismissed the challenges for lack of jurisdiction. See *Friends of the Everglades*, 699 F.3d at 1285. Here, the JPML consolidated the petitions before the Sixth Circuit, which held that it had jurisdiction under Section 1369(b). Consolidation Order, MCP No. 135 (J.P.M.L. July 28, 2015). The same petitions could very well have been consolidated before the Eleventh Circuit, where two petitions were pending when the JPML ordered consolidation. See *id.* at 2. Had the JPML ordered consolidation before the Eleventh Circuit, that court undoubtedly would have dismissed the petitions for lack of jurisdiction, based on circuit precedent, and the agencies would now be seeking this Court's review, just as they did in *Friends of the Everglades* (No. 13-10). Jurisdiction here was decided by a turn of the JPML wheel.

2. This jurisdictional morass is costly for everyone. The 100 petitioners before the Sixth Circuit have litigated the issue of jurisdiction over challenges to the WOTUS Rule not only before that court, but also before

the Tenth Circuit, the Eleventh Circuit, and over a dozen district courts throughout the Nation.

The courts, too, have suffered from a lack of jurisdictional clarity. Apart from the Sixth Circuit's sharply divided 1-1-1 decision, four district courts have reached incongruous determinations on their jurisdiction under the APA. See Pet. 9, 13. The Eleventh Circuit has published an opinion explaining why it is currently abstaining under *Colorado River* from deciding the issues—an erroneous decision that only kicks the can down the road. See *Georgia* v. *McCarthy*, 2016 WL 4363130 (11th Cir. Aug. 16, 2016) (per curiam).[3] And the Tenth Circuit is scheduled to hear oral argument on the same question in November 2016. See Order, *Chamber of Commerce* v. *EPA*, No. 16-5038 (10th Cir. Sept. 19, 2016).

Meanwhile, no court has yet received a single brief on the merits of the challenges to the June 2015 WOTUS Rule.

3. Any delay of this Court's resolution of the question presented by the petition will inflict additional harm with no corresponding benefits. The agencies have argued that the Sixth Circuit's jurisdictional decision is "as clear and final as

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[3] Federal courts may abstain under *Colorado River* only when state courts are exercising "concurrent jurisdiction." *Colo. River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 818 (1976). But there are no relevant state court proceedings here. Nor are the Sixth Circuit and district courts exercising "concurrent" jurisdiction. *Either* the Sixth Circuit has jurisdiction under Section 1369(b), *or* the district courts have jurisdiction under the APA; "both" is not a possible answer. The Eleventh Circuit should have decided where jurisdiction properly lies. See *Arizona* v. *San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 559-560 (1983) (abstention under *Colorado River* is "improper" if jurisdiction is not "concurrent").

possible," and conclusive "barring intervention by the Supreme Court." Gov't Br. 21-22, 36, *Chamber of Commerce* v. *EPA*, No. 16-5038 (10th Cir. Aug. 19, 2016). If that is so, then future proceedings on the merits in the Sixth Circuit will not shed additional light on the court's jurisdiction.

Nor will further proceedings in the APA actions add clarity. After hearing oral argument in November, the Tenth Circuit must either pick a side in the already-mature debate or, like the Eleventh Circuit, decide not to decide just yet. Neither of those outcomes will establish whether the Sixth Circuit has jurisdiction under Section 1369(b). The same is true for all district courts that have not yet resolved their jurisdiction, including the Texas and Florida district courts in which respondents' challenges are pending. The arguments for and against jurisdiction under Section 1369(b) have been fully developed and aired in the lower courts. The disagreement among the lower courts has been acknowledged by the Eleventh Circuit, the Sixth Circuit, and the Solicitor General; the issue is ripe for this Court's review.

Until this Court intervenes, a cloud of jurisdictional doubt will hover over all court decisions on the WOTUS Rule challenges. If the Sixth Circuit were to reach the merits, some party will lose on some issue. That party could then petition for rehearing or certiorari and contest the Sixth Circuit's jurisdiction. If future jurisdictional challenges are successful, they will wipe away all Sixth Circuit orders, rendering all proceedings from this point forward for naught. There is no need to inflict these additional, avoidable costs on the Sixth Circuit and the parties when this Court can answer the question now.

4. Given the WOTUS Rule's "unique importance" (Gov't Br. 63, *Chamber of Commerce* v. *EPA*, No. 16-5038 (10th Cir. Aug. 19, 2016)), the costs and uncertainties in this case alone are sufficiently weighty to grant certiorari. But the concerns raised here extend beyond the challenges to the WOTUS Rule.

The same jurisdictional issue continues to plague the litigation over the challenges to EPA's water transfers rule, which was issued in 2008. The Eleventh Circuit in *Friends of the Everglades* rejected EPA's argument that Section 1369(b)(1)(F) "appl[ies] to any 'regulations relating to permitting'" and thus dismissed the challenges to the water transfers rule for lack of jurisdiction. 699 F.3d at 1288. The same challenges are now before the Second Circuit on appeal from the APA decision in *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *EPA*, 8 F. Supp. 3d 500 (S.D.N.Y. 2014). If Judge McKeague is right that the courts of appeals have exclusive jurisdiction under Section 1369(b)(1)(F) to review any regulation that "impact[s] permitting requirements" (Pet. App. 18a), then the Eleventh Circuit erred in *Friends* and the Second Circuit lacks subject matter jurisdiction in *Catskill Mountains*.

EPA has argued to the Second Circuit that it is collaterally estopped from contesting that court's jurisdiction because of its participation in *Friends of the Everglades*. See EPA Br. 3-4 & n.2, *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *EPA*, No. 14-1823 (2d Cir. Sept. 11, 2014). We doubt that absolves a court of its duty to determine whether it has subject matter jurisdiction. But, in any event, there are many appellants (*e.g.*, the Arizona Department of Water Resources) and appellees (*e.g.*, Catskill Mountains Chapter of Trout Unlimited, Inc.) in *Catskill Mountains* that are not bound by *Friends of*

the Everglades. Any party aggrieved by the Second Circuit's merits ruling—or, indeed, any *amicus curiae* in the case—could seek a jurisdictional ruling on rehearing or certiorari. See *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 280 n.14 (1978) ("*amici*['s]" challenges to "jurisdiction * * * must be considered").

Until this Court resolves the issue, the uncertainties over the scope of Section 1369(b) will continue to beleaguer challenges to the WOTUS Rule, the water transfers rule, and future CWA rulemakings. The substantial public and private costs of the current uncertainty will continue to accrue. This Court can, and should, put an end to this waste by granting the petition for certiorari now.

II. Section 1369(b)(1)(F) Does Not Authorize Court Of Appeals Jurisdiction Over The Challenges To The WOTUS Rule.

The petition convincingly demonstrates that the agencies have badly misinterpreted Section 1369-(b)(1)(F), as two members of the Sixth Circuit panel agreed. Pet. 14-20. Respondents fully concur with petitioner's arguments and will not burden the Court by repeating them here. We offer two additional observations.

1. While the WOTUS Rule might *affect* when Section 1342 permits are or are not required, the Rule is *not* an "Administrator's action * * * in issuing or denying any permit under section 1342," which is the only action to which Section 1369(b)(1)(F) applies. The agencies *admitted* as much throughout the rulemaking process, when they repeatedly described the WOTUS Rule as merely "definitional." See, *e.g.*, Clean Water Rule Response to Comments—Topic 8: Tributaries at 252 ("The agencies further note that the final rule is solely a definitional rule, and specific implementation

of permitting programs, including the CWA NPDES program, are beyond the scope of the rule."); *id.* at 510 ("The final rule does not establish any regulatory requirements. Instead, it is a definitional rule * * *."); 80 Fed. Reg. at 37054 (same).[4] The agencies were correct when they made these admissions during the rulemaking and should not be permitted to contradict them now in litigation.

2. The agencies contended, in their recent Tenth Circuit brief, that Section 1369(b) should be interpreted "pragmatically." Gov't Br. 39, *Chamber of Commerce* v. *EPA*, No. 16-5038 (10th Cir. Aug. 19, 2016). In support of this argument that the text of the statute should be ignored in favor of reaching a result that the agencies prefer, the agencies reasoned that Section 1369(b) is "a 'poorly drafted and astonishingly imprecise statute'" and that "Congress did not anticipate the myriad kinds of regulatory actions that would be necessary to administer the Act's limitations and permitting programs." *Ibid.* The agencies' reasoning, however, provides no support for the exercise of original and exclusive jurisdiction under Section 1369(b).

"The role of [courts] is to apply the statute as it is written—even if [they] think some other approach might accor[d] with good policy." *Burrage* v. *United States*, 134 S. Ct. 881, 892 (2014). That is especially true for questions of subject-matter jurisdiction. A court of appeals only has "jurisdiction to hear petitions for direct review of agency action when Congress says so." *Loan Syndications & Trading Ass'n* v. *SEC*, 818 F.3d 716, 718 (D.C. Cir. 2016). "Whether initial

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[4] The agencies' Response to Comments is available at https://www.epa.gov/cleanwaterrule/response-comments-clean-water-rule-definition-waters-united-states.

subject-matter jurisdiction lies initially in the courts of appeals must of course be governed by the intent of Congress and not by any views we may have about sound policy." *Fla. Power & Light Co.* v. *Lorion*, 470 U.S. 729, 746 (1985).

Congress specified in Section 1369(b) that only seven narrow categories of EPA actions are to be reviewed directly by the courts of appeals. By no stretch of the imagination can these facial challenges to the WOTUS Rule be said to fall under any of those seven categories, including paragraphs (E) or (F), as the petitioner and two panel members below cogently explained. And no amount of argument that court of appeals review is supposedly more "pragmatic" can overcome the fact that the plain text of Section 1369(b) does not fit these challenges to the Rule. As the petitioner has explained (Pet. 28-31), there are plenty of reasons to believe that district court APA review is in fact the more "pragmatic" approach. But when the statute is this clear on its face, there is no need for the Court to engage in that inquiry: the statute controls until Congress amends it.

Applying the plain text of the CWA, the Sixth Circuit lacked jurisdiction to review the Rule. Jurisdiction lies exclusively in the district courts under the APA. See 5 U.S.C. § 703. The Court should grant certiorari to restore Congress's intent when it enacted Section 1369(b).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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